United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75/7021

ORIGINAL 75-7021

To be argued by
MICHAEL AMBROSIO

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ROBERT J. FINE,

Plaintiff-Appellant,

-against-

THE CITY OF NEW YORK, FRANK KLEIN, MARVYN KORNBERG, ESQ., ALBERT GAUDELLI, ESQ. and HERBERT KAHN, ESQ.,

Defendant-Appellees.

PTL. ANTHONY SALADINO, ESTATE OF ROBERT L. RADTKE, DET. MICHAEL SASSMAN, PTL. "JOHN" STANLEY, PTL. "JOHN" DWYER, PTL. "JOHN" FISCHER, SGT. "JOHN" MURRAY, DAVID FAULKNER, MRS. DOLORES FAULKNER,

Defendants.

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B/S

BRIEF OF THE APPELLEE CITY OF NEW YORK

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BRIEF OF APPELLEE CITY OF NEW YORK

PRELIMINARY STATEMENT

Plaintiff appeals from orders of the United States District Court for the Southern District of New York (BRIEANT, J.) dismissing his complaint as against the defendant-appellees, City of New York, Frank Klein, Marvyn Kornberg, Esq., Albert G. Gaudelli, Esq., and Herbert Kahn, Esq.

On November 22, 1974, Judge Brieant granted the motions of defendants Gaudelli, Kahn, Klein and Kornberg seeking dismissal of plaintiff's civil rights action as against them. The Court, sua sponte, dismissed the action as against the City of New York because "no claim was stated against the defendant City of New York under the federal statute."*

Plaintiff filed a notice of appeal from Judge Brieant's decision, and on April 8, 1975, made a motion in the district court pursuant to Rule 60(b) F. R. Civ. P. for an order granting relief from the final judgment. On May 27, 1975, Judge Brieant issued an order adhering to his decision of November 22, 1974.

Question Presented

Was the dismissal of plaintiff's action as to defendant City of New York correct?

Facts

In March, 1972, David Faulkner, a minor, was arrested for attempting to sell a firearm. While being questioned by the police, Faulkner stated that the gun belonged to plaintiff, Robert Fine, with whom Faulkner was engaged in a homosexual relationship (37A).** The New York City police thereupon conducted several warrantless searches of plaintiff's apartment. During the course of these searches the police seized gambling notations, photographs of nude males and a photograph of David Faulkner in the nude.

*The statute referred to in the decision appears to be the Civil Rights Act. Clearly, under Monroe v. Pape, 365 U.S. 167 (1961), municipalities are not "persons" within the meaning of the Act and are immune from liability.

**Numerals in parentheses refer to pages in the plaintiff-appellant's Appendix.

Mr. Fine was arrested sometime thereafter, and charged with sodomy, endangering the welfare of a child, promoting gambling, possession of gambling records in the second degree and possession of weapons and dangerous instruments and appliances as a misdemeanor (28a). On January 17, 1974, an order of the Supreme Court, Queens County (BRENNAN, J.), was entered, directing the suppression of the evidence seized from Mr. Fine's apartment (37a). Following the suppression of the evidence, the indictments which were pending against the Mr. Fine were dismissed. He then commenced a replevin action against the City of New York in the state courts to secure the return of the seized property, and commenced this action in the federal courts based upon the Civil Rights Laws, 42 U.S.C.§§ 1981-1988, 28 U.S.C.§§1331 and 1343 and upon the 14th Amendment.

On November 22, 1974, Judge Brieant dismissed plaintiff's action against the City of New York. On May 27, 1975, Judge Brieant issued an order adhering to his decision of November 22, 1974.

ARGUMENT

THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFF'S SUIT AGAINST THE CITY OF NEW YORK BECAUSE HE HAD NO FEDERAL CAUSE OF ACTION AGAINST THE CITY. EVEN IF HE HAD SUCH A CAUSE OF ACTION, IT IS TIME BARRED.

(1)

The dismissal of the plaintiff's case against the City of New York on November 22, 1971, was doubtless based upon Monroe v. Pape,

365 U.S. 167 (1961), which held that a municipality was not a "person" within the meaning of the Civil Rights Act and could not be sued thereunder. Subsequently, a panel of this court rendered a decision in Brault v. Town of Milton, ____F 2d____(2nd Cir., 2/24/75), holding that a cause of action against a municipality can be founded directly upon the 14th Amendment, and that the federal courts had jurisdiction over the cause of action under 28 U.S.C. § 1331. On April 17, 1975, this Court granted the application of the Town of Milton for a rehearing en banc. The City of New York submitted a brief amicus curiae in support of the Town of Milton's position on the en banc rehearing.

On October 1, 1975, this court, sitting en banc, rendered a decision affirming the dismissal of the Brault's complaint. The court, however, did not reach the question of whether a cause of action for damages can be founded directly upon the 14th Amendment. Under the circumstances, this question must be deemed an unsettled one in this circuit.* Insofar as the plaintiff here may seek to establish municipal liability on the basis of 28 U.S.C.§1331 and the 14th Amendment, the City of New York relies upon its brief amicus curiae, dated May 21, 1975, submitted to this court on the en banc rehearing in Brault v. Town of Milton (a copy of this brief has been served upon the plaintiff-appellant), and continues to assert that no such cause of action is cognizable in the federal courts. In the balance of this brief we assume, arguendo, that a municipality may be sued in federal court on a 14th Amendment tort theory.

*We note, however, that in a case which was decided before Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), Eisefier v. City of New York, 312 F. 2d 890 (2nd Cir., 1963), this court rejected a claim based directly upon the 14th Amendment.

The instant case raises questions which go beyond those raised in Brault. As Judge Bryant recognized in his decision below, the injuries allegedly sustained by the Braults flowed from the Town of Milton's invalid enactment of a municipal zoning ordinance and its enforcement of that invalid ordinance in the Vermont courts. In enacting and enforcing an ordinance a municipality performs an act which is essentially characteristic of a municipal corporation. It is difficult to conceive of a situation in which a municipal corporation acts more clearly qua municipal corporation than in enacting local legislation. Here, however, the liability sought to be imposed upon the City of New York is completely derivative. The plaintiff alleges in the instant case that he was injured by the action of seven of the city's three hundred thousand employees.* Even if he can prove his allegations against the individual defendants, the imputation of their acts to the City of New York is nothing more than a legal fiction.

In Johnson v. Glick, 481 F. 2d 1028 (2nd Cir., 1973), this court wrote, at page 1034:

> "The rule in this circuit is that when monetary damages are sought under §1983 the general doctrine of respondeat superior does not suffice and a showing of some personal liability is required.
>
> . . .
>
> Here the complaint alleged only that Warden Glick was in charge of all the correctional officers employed at the House of Detention. It did not allege that the warden had authorized the officer's conduct, ...,

*Although plaintiff's brief makes several references to the New York City Property Clerk who is allegedly illegally withholding some "valuable property" belonging to plaintiff, the Property Clerk was not sued in this action and there are no allegations in the complaint that he is withholding plaintiff's property.

> or even that there has been a history of previous episodes requiring the warden to take therapeutic action ... it alleged a single spontaneous incident, unforeseen and unforeseeable by higher authority."

The considerations which led this court to reject derivative liability in §1983 actions are even more relevant in this action seeking to found a cause of action directly upon the 14th Amendment. Without attempting a historical analysis of the purposes of the 14th Amendment, it is safe to say that its ratification reflected the national concern that the recently defeated confederate states were attempting either directly, through the enactment of black codes, or indirectly, through the manner in which they applied apparently neutral laws, to reduce the newly freed slaves to their previous condition of bondage. The amendment was directed to the alleviation of this problem. Certainly, time and circumstance have properly broadened the reach of the amendment beyond the circumstance of its enactment. Indeed, Congress in the exercise of the special responsibility conferred upon it by §5 of the 14th Amendment, broadened its scope through the enactment of the Civil Rights Acts. But the plaintiff here does not and cannot avail himself of those acts and seeks instead to secure relief in the federal courts on the basis of the amendment itself. But the plaintiff's allegations do not address themselves to the type of concern toward which the amendment was addressed. We have no allegations here that the City of New York has a government policy which fosters and approves of unconstitutional conduct by its employees. There is no allegation that the City of New York has enacted a statute authorizing its police to make unconstitutional searches and seizures. Nor is there any allegation that the problem of illegal searches and seizures is rife in the City of New York and that responsible elected officials knew or should

have known of the problem but have failed to take any action to correct it. Indeed, the record shows that the fruits of the search of plaintiff's apartment have been suppressed by the state courts; that the Special Prosecutor's Office has conducted an investigation of the incident (128a); that a state grand jury has taken testimony about the matter (129a); and that the Police Department has brought disciplinary charges based on plaintiff's complaint. Clearly, there has been no failure by the state and municipal authorities to take action in this case.

Although there has been no allegation of an express or implied municipal policy authorizing or condoning the undertaking of illegal searches and seizures by police officers, the plaintiff asks this court to recognize a cause of action founded directly upon the 14th Amendment and to hold the city vicariously liable on that cause of action. While it is true that the courts of New York could impose vicarious liability upon the municipality in a tort action founded upon the same facts as alleged here, plaintiff has not brought a state court action.* Nor is this a diversity suit. His only claim to federal relief is based upon the allegation that constitutional rights are at stake. Presumably, if a constitutional cause of action may be deemed to exist at all, the primary function of the federal court which exercises jurisdiction over such a cause of action is the vindication of the constitutional imperative which has allegedly been violated. This purpose would scarcely be served by the introduction into constitutional law of the concept of liability without fault.

*We suggest that this case is brought here because the state action is time barred. See infra, pp. 9-10.

If the constitution has been violated and a cause of action exists for that violation, then let the violator be held liable. But the municipal corporation has not violated the constitution. The spontaneous incidents giving rise to this action were neither foreseeable nor foreseen by the municipality or its officers. It should not be held liable for the conduct of individual employees which it neither encouraged nor foresaw and which it does not now condone.

Clearly, plaintiff's right to recover from the City of New York is rooted in the state common law doctrine of respondent superior. (The federal courts have refused to apply the doctrine in suits against the United States. Robertson v. Sichel, 127 U.S. 507 (1888); Bigby v. U.S., 188 U.S. 400 (1903). Therefore, as to the City of New York, the cause of action does not "arise under" the constitution within the meaning of 28 U.S.C. §1331, because plaintiff's ability to recover against the City does not rest upon the resolution of a dispute respecting the validity, construction or effect of the constitution, but upon the application of the state common law tort doctrine of respondeat superior. See, Shoshone Mining Co.v. Rutter, 177 U.S. 505 (1900), Shulthis v. McDougal, 225 U.S. 561 (1912); Hopkins v. Walker, 244 U.S. 486 (1917); Gully v. First National Bank, 299 U.S. 109 (1936).

(2)

Not only is the claim asserted here against the city distinguishable from that asserted in Brault, it is also distinguishable from that in Bivens, where the Supreme Court, with some hesitation, and to avoid anomalous results, held that federal agents could be sued in federal court on a Fourth Amendment tort theory. Here, of course the "agents" are not federal agents, and plaintiff seeks to secure damages not only from the agents themselves but also from their governmental employer-a result which Bivens does not support.

See, also, the discussion of Bivens in our Brandt amicus curiae brief.

(3)

Even assuming that a cause of action may be founded directly upon the 14th Amendment, and further assuming that vicarious liability may be imposed upon a municipality pursuant to that cause of action the plaintiff's suit is barred by the statute of limitations.

Had plaintiff commenced an action in the courts of New York the City would have raised, as it did here, §50-i of the General Municipal Law which states that:

> "No action ... shall be prosecuted or maintained against a city ... for personal injury or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, ..., or of any officer, agent or employee thereof, ... unless, ...(c) the action ... shall be commenced within one year and ninety days after the happening of the event upon which the claim is based."

The acts of the municipal police officers complained of here took place in or about March, 1972. This suit was not commenced until the summer of 1974. Clearly, plaintiff's cause of action would be barred in the state courts.

Plaintiff's claim against the City is founded directly upon the 14th Amendment. Should such a cause of action be deemed to exist, some period of limitations would have to govern it. There is no general federal statute of limitations. 2 Moore's Federal Practice 8 3.07 [2], fn. 2. However, in a recently decided case, Johnson v. Railway Express Agency, 43 U.S.L.W. 4623 (May 19, 1975), the Supreme Court held that in the absence of a federal statute of limitations, applicable to a cause of action under §1981, the controlling period

would be the most appropriate one provided by state law. In that case, the Court found a one year statute to be applicable. We submit that the alleged cause of action founded directly upon the 14th Amendment should be governed by the applicable state statute of limitations just as the statutory cause of action for violation of the 14th Amendment is. To do otherwise, would be to invite a flood of lawsuits by plaintiffs who have slept upon their rights in the state courts. As we pointed out in our brief amicus curiae, in Brault v. Town of Milton, _____ 2d _____ (October 1, 1975), and as this case amply demonstrates, it is rather easy to transform a traditional state court tort action into a constitutional cause of action. Assuming such a cause of action to exist, the application of the state statute of limitations governing municipal torts to this cause of action will act as a salutary curb upon the commencement of untimely litigation.

We submit that our argument that the state statute of limitations must govern any constitutional cause of action which may be deemed to exist is supported by the en banc decision in Brault v. Town of Milton. The majority and concurring opinions point out that, even assuming the existence of a 14th Amendment cause of action, the Brault's suit was barred by the Vermont doctrine of sovereign immunity. The doctrine of sovereign immunity is a much harsher deprivation of remedy than the New York one year statute of limitations on municipal torts. This plaintiff, unlike the Braults, had a complete remedy available to him in the New York Courts for any injuries he suffered at the hands of the municipal policemen. Having slept upon his rights and now being barred from the state courts, he should not be permitted to avoid the New York forum closing rule by resort to the federal court.

Plaintiff's final argument is that the trial judge erred in refusing to take ancillary jurisdiction over the City of New York pursuant to Hurn v. Oursler, 289 U.S. 238 (1933). Suffice it to say, that the exercise of ancillary jurisdiction is within the discretion of the trial court. In Moor v. County of Alameda, 411 U.S. 693 (1973), the Supreme Court approved of the lower court's refusal to take ancillary jurisdiction over Alameda County in a §1983 action. The court noted that the exercise of ancillary jurisdiction over the claims against the County which is exempt from §1983 liability, as is the defendant City of New York, would bring before the federal court an entirely new party, not merely a new issue. Moreover, as we have pointed out, the plaintiff's state law claim against the City of New York over which he asks the federal court to take ancillary jurisdiction is now time-barred.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

October 14, 1975

Respectfully submitted,

W. BERNARD RICHLAND,
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Attorney for the Defendant,
Appellee, City of New York

L. KEVIN SHERIDAN,
MICHAEL AMBROSIO,

of Counsel.

R J Fine

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

BRUCE GARNER

being duly sworn, says, that on the 14 day of Oct, 1975

at No. 230 Park Ave in the Borough of Man in The City of New York, he served three copies of the annexed Brief of the Appellee upon Dan Brecher Esq., the attorney for the app. att. in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 14 day of Oct, 1975

Bruce Garner

Patrick J. Rooney

Notary Public, State of New York. No. ... Qualified in Bronx County. Term Expires March 30, 1976

R. J. Fine

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

JAMES BURNS

being duly sworn, says, that on the 14 day of Oct, 1975

at No. 2 World Trade Center in the Borough of Man in The City of New York, he served three copies of the annexed Brief of The Appellee upon Louis I. Lefkowitz Esq., the attorney for the Albert Gardella & Kahn in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 14 day of Oct, 1975

James Burns

Patrick J. Rooney

PATRICK J. ROONEY, Notary Public, State of New York, No. ... Qualified in Bronx County. Term Expires March 30, 1976

R J. Fine

AFFIDAVIT OF SERVICE ON ~~ATTORNEY~~ BY MAIL

State of New York, County of New York, ss.:

Carlos M Rodriguez being duly sworn, says that on the 14 day of Oct 1975, he served the annexed Brief of the Appellee upon Frank Klein Esq., the ~~attorney~~ for the Pro Se herein by depositing 3 copies of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States, in said city directed to the said ~~attorney~~ at No. 42-15 43rd Ave in the ~~Borough~~ of Long Island, ~~City~~ of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
14 day of Oct 1975

Carlos M Rodriguez

Robert Rosen

Notary Public

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R J. Fine

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Carlos M Rodriguez being duly sworn, says that on the 14 day of Oct 1975, he served the annexed Brief of the Appellee upon Harold C Harrison Esq., the attorney for the Mulvey Harberg herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 110-21 Queens Blvd in the Borough of Forest Hills, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this
14 day of Oct 1975

Carlos M Rodriguez

Robert Rosen

Notary Public

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